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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-139

J. D. KITCHENS,
Petitioner,

vs.

STATE OF MISSISSIPPI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

OPINION BELOW

The opinion of Supreme Court of Mississippi is reported as *Kitchens* v. *State*, 293 So.2d 815 (Miss. 1974). Rehearing was denied on May 20, 1974. A copy of the opinion is attached hereto as Appendix A.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court by way of a Petition For Writ Of Certiorari through the authority of 28 U.S.C., Section 1257(3). Jurisdiction is properly invoked by virtue of the Sixth Amendment question presented in regard to the right to a trial by jury for the crime of constructive contempt of court.

QUESTIONS PRESENTED

(1) Whether the due process rights of petitioner under the Fourteenth Amendment were violated in regard to the information charging petitioner with the crime of constructive contempt of court?

(2) Whether the evidence presented justified the findings of the trier of fact?

(3) Whether petitioner, charged with constructive contempt of court, was entitled to a trial by jury under the Sixth Amendment?

STATEMENT OF THE CASE

Mr. R. C. Nowell was summoned for jury duty on a special venire drawn for the case of State of Mississippi v. Jimmy D. Kitchens which was scheduled for trial on April 16, 1973. Two days before the trial date, petitioner, father of Jimmy D. Kitchens, visited Mr. Nowell at his home. It had been many years since petitioner had visited the home of Mr. Nowell. During the visit, petitioner asked

Mr. Nowell if he had been summoned for jury duty, and Mr. Nowell replied that he had a summons. Then, petitioner remarked, "Well, my boy is up for trial." Petitioner did not say anything more about the jury duty and his son's trial. He did not directly ask Mr. Nowell for any favors in regard to his son's trial. However, the conversation proceeded into a discussion of their friendship during their youth, and the fact that petitioner had befriended Mr. Nowell's father on one occasion.

Mr. Nowell later indicated to the trial court on voir dire examination that he wanted to be excused from jury duty because he and petitioner had been raised together and now, petitioner's son was going to be tried. As a result, the trial court sustained the defendant's motion to quash the jury panel.

Petitioner was charged in the Circuit Court of Jones County, Mississippi, with constructive contempt of that court. Petitioner was tried and adjudged guilty of the offense and sentenced to serve a term of six (6) months in the Jones County Jail.

REASONS FOR DENYING THE WRIT

No question of substance is presented by petitioner's assertion that his due process rights were violated by the vague and indefinite charge contained in the information.

The issue in regard to the sufficiency of the evidence is not properly before this Court.

Further, the opinion of the Mississippi Supreme Court as to petitioner's right to a trial by jury is not at variance with the applicable decisions of this Court.

ARGUMENT

Petitioner would urge that the information is vague and indefinite and does not affirmatively charge that he committed any act whatsoever. Respondent submits that petitioner's contention is without merit. A review of the information (Petitioner's Brief, pp. 8-9) demonstrates that paragraphs II and III set out specifically the facts alleged to constitute the offense and meet the essential requirements of such pleadings. SEE: *Jordan* v. *State*, 216 Miss. 542, 62 So.2d 886 (1953).

Further, it has been decided by this Court that an assertion of a violation of a constitutional right to be specifically informed of the nature of the offense charged does not raise a Federal question of sufficient merit to sustain a writ of error from this Court. *Barrington* v. *Missouri*, 205 U.S. 483, 51 L.Ed. 890, 27 S.Ct. 582 (1907); *Caldwell* v. *Texas*, 137 U.S. 692, 34 L.Ed. 816, 11 S.Ct. 224 (1891).

Respondent submits that petitioner's second contention, that the evidence was insufficient to support the findings of the trier of fact is not properly before this Court. It is well established that this Court has no jurisdiction to review a decision of a state court, affirmed by the highest court of the state, which was based upon a pure question of fact. *Dower* v. *Richards*, 151 U.S. 658, 38 L.Ed. 305, 14 S.Ct. 452 (1894).

For the purposes of deciding whether or not a defendant is entitled to a trial by jury in a contempt case, this Court has considered whether the contempt is a petty or serious offense and has held that the punishment imposed is the determinative factor. *Bloom* v. *Illinois*, 391 U.S. 194, 20 L.Ed.2d 522, 88 S.Ct. 1477 (1968). Further,

this Court has decided that crimes punishable by a maximum of six months imprisonment are petty and do not require a jury trial. *Baldwin* v. *New York*, 399 U.S. 66, 26 L.Ed.2d 437, 90 S.Ct. 1886 (1970).

In the case of *Hinton* v. *State*, 222 So.2d 690 (Miss. 1969), the Mississippi Supreme Court adopted the reasoning of *Bloom, supra*, and held:

> . . . where the confinement is not more than six months and the fine not more than $500, that the offense is a petty one and the accused is not entitled to a jury trial under the Sixth Amendment to the Constitution of the United States. (222 So.2d 690 at 692)

Thus, the opinion of the Mississippi Supreme Court as to petitioner's right to a trial by jury is not at variance with the applicable decisions of this Court.

CONCLUSION

Respondent respectfully submits that there has been no violation of petitioner's rights under the Sixth and Fourteenth Amendments to the Constitution of the United States and the Petition For Writ Of Certiorari should be denied.

Respectfully submitted,

A. F. SUMMER, Attorney General
By: KAREN GILFOY
Special Assistant Attorney General
PETE J. CAJOLEAS
Special Assistant Attorney General
Of Counsel

CERTIFICATE

I, Pete J. Cajoleas, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a copy of the foregoing Brief in Opposition to Mr. L. Percy Quinn, Attorney at Law, P. O. Box 1085, Laurel, Mississippi 39440.

This the 18th day of November, 1974.

PETE J. CAJOLEAS
Special Assistant Attorney General

APPENDIX A

IN THE SUPREME COURT OF MISSISSIPPI

No. 47,869

J. D. KITCHENS

v.

STATE OF MISSISSIPPI

SMITH, JUSTICE:

J. D. Kitchens was charged in the Circuit Court of Jones County with constructive contempt of that court. Following trial, he was adjudged guilty of that offense and sentenced to serve a term of six months in the county jail. He appeals from that judgment and sentence.

A number of matters are assigned as having constituted reversible error.

First, it is argued that the jurisdiction of the trial court to try the case was not established. This contention is without merit. In *Prine* v. *State*, 143 Miss. 231, 242, 108 So. 716, 719 (1926), it was stated:

> No other court [except the court against which the contempt was committed] has any authority to punish such a contempt. Statutes regulating the venue of trials of criminal offenses generally are inapplicable to contempt proceedings.

At page 126, 17 C.J.S. *Contempt*, section 51 (1963), the rule is given as follows:

> It is a well established rule that the power to judge a contempt rests exclusively with the court contemned, and that no court is authorized to punish a contempt against another court.

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To the same effect, *see also* 17 C.J.S. *Contempt*, section 64, page 167 (1963).

We have examined and considered the other alleged errors assigned and have concluded from the record that appellant was fairly tried and that the evidence was sufficient to support the trial judge's findings.

The contention that appellant was entitled to trial by jury was dealt with and rejected by this Court in *Hinton* v. *State*, 222 So.2d 690 (Miss. 1969).

The trial judge's opinion, delivered following the trial, is unusually comprehensive and well reasoned and we adopt the following portion of it as the opinion of this Court.

> The defendant, J. D. Kitchens, is the father of Jimmy D. Kitchens, the latter having been indicted for murder by the grand jury of the Second Judicial District of Jones County, Mississippi, during the regular March 1973 Term of Court. The case of the State of Mississippi vs. Jimmy D. Kitchens, No. 4459, was scheduled for trial on Monday, April 16th, 1973, and prior to that date on motion of the defense counsel a special venire had been drawn to appear on Monday morning, April 16th, 1973. The venire, as I recall, contained names of 48 prospective jurors, among whom was one R. C. Nowell.
>
> On Saturday, April 14th, 1973, somewhere in the neighborhood of twelve-thirty, the defendant, J. D. Kitchens, approached the prospective juror, R. C. Nowell, at his home, and the Court after hearing the testimony of both Mr. Nowell, who was the State's only witness, and the two witnesses for the defendant, J. D. Kitchens, who testified in his own behalf, and his wife, Mrs. J. D. Kitchens, the Court can find no

other basis for a visit other than for the purpose of influencing a juror in this case. The testimony is somewhat hazy concerning whether or not the defendant knew at the time he visited the prospective juror whether he knew Nowell was at that time, or had at that time, already been summoned. The Court finds that he did know.

There is nothing revealed in the conversation that took place at their home to make the Court believe that it was for any other purpose than for one old friend to play on the human frailty of a friendship that had found its beginning in early childhood. I think it is of significance in this case that the defendant used that visit for the purpose of reminding this prospective juror of favors he had bestowed upon the juror's father years ago. The only real substance of that conversation was the fact that this defendant's son was in jail and that his trial was eminent.

R. C. Nowell is a person personally known to this Court, and he is a person in my opinion who is trustworthy and honest, although in this case it is apparent that he has been reluctant to implicate an old friend. The effect of that visit is vividly seen in what transpired immediately following the termination of that visit. This prospective juror being prodded by his conscience called the District Attorney and related to him that he had been approached and requested the District Attorney to excuse hem [sic] from the case. When this was developed on the voir dire examination on Monday morning, April 16th, 1973, the special venire, on motion of both the State and defense counsel, was quashed and the Kitchens trial was continued for the term, and on the Court's own order this information presently pending before the Court was filed by the District and County Attorneys.

From the evidence the Court finds that the defendant, J. D. Kitchens, and the venireman, R. C. Nowell, reside about twenty miles apart, both being residents of Jones County, that years ago they were good friends and often attended the same church together, the venireman's father having been the pastor of the church where they attended. That during the period of time when they attended church together they were good friends, and as is already indicated the defendant Kitchens befriended the pastor on at least one occasion, and these elements of friendship were rehashed again for what the Court thinks was a very apparent purpose on April 14th, 1973, when the defendant Kitchens contacted this prospective juror. It is also of significance that these parties had not visited together, and this is undisputed, ever in the home of the venireman, R. C. Nowell, until two days prior to the scheduled trial.

The fact that R. C. Nowell, who is in the Court's estimation, an honorable and trustworthy citizen of this County, felt constrained to report to the District Attorney that he had been contacted and to request that he be excused from the jury panel bespeaks loudly and clearly the embarrassing position in which this juror found himself. The purpose of the visit created subtle persuasion brought about by the defendant. The result of it is that the trial of one who is charge [sic] with one of the most serious crimes known in this nation has been delayed. The acts of the defendant were designed and calculated to obstruct, defeat, and impede justice and the administration thereof.

It doesn't matter that the defendant was tactful and subtle or that he skillfully and diplomatically engaged in euphemistic camouflage of purpose in mak-

ing the visit, or in reminding this prospective juror of the past acts of friendship existing between himself and the venireman, and himself and the venireman's father.

The Court is not called upon in this case to refine the purpose of this visit to the point of being able to say beyond any doubt that it was for the purpose of creating a condition that would result in the State being required to exercise one of its peremptory challenges, or whether it was for some other equally illegal or unlawful purpose. The fact remains that it did in fact result in the delay of a trial and in the delay of justice.

Contemptuous acts for which one may be found guilty of obstructing the administration of justice are not limited to bribery of a juror or such other blatant indiscretions. Any act or conduct which tends to bring the authority of the Court and the administration of law into disrepute or which impedes the due administration of justice is subject to being punished as a contempt of court. Here, the act of the defendant of which complaint is nade, [sic] unquestionably was calulated [sic] and intended to play on human frailty and proof that defendant's shots hit their mark is found in the fact that the venireman, though unlearned in law, felt compelled to report the incident to the District Attorney within a few minutes after defendant's visit was concluded. Any wilful attempt, of whatever nature, intended to influence jurors improperly in the impartial discharge of their duties, whether by conversations or discussions, is contemptuous and it is wholly unnecessary that such attempt to influence the jurors should have succeeded. Here they did.

For these reasons, it will be the finding of the Court that the defendant, J. D. Kitchens, on April 14th, 1973, at the home of the venireman, R. C. Nowell, committed an act which the Court finds to be contemptuous, and it will be the sentence of the Court that the defendant be sentenced to serve a term of six months in the County Jail.

AFFIRMED.

RODGERS, P. J., and ROBERTSON, SUGG and BROOM JJ., CONCUR.